Supreme Court, U.S.
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No. 10-529

In the Supreme Court of the United States

ARTHUR PARRA, SR., KIM ENG, VAL ENG, LAURA ENG, KAM WAN CHAN, EVA CHAN, PETER CHAN, and ANTONIO VALENZUELA, individually and on behalf of all voters similarly situated,

Petitioners,

v.

LANGDON D. NEAL, Chairman of the Chicago Board of Election Commissioners, RICHARD A. COWEN, Secretary of the Chicago Board of Election Commissioners, MARISEL A. HERNANDEZ, Election Commissioner, Chicago Board of Election Commissioners, LANCE GOUGH, Executive Director of the Chicago Board of Election Commissioners, CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a class action brought by voters under Title VII of the Civil Rights Act alleging violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case presents a challenge to the intentional retroactive invalidation of votes without notice.

The questions presented are:

1. Whether voters are deprived of the right to vote as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983 where an election authority's after-the-fact decision not to count votes lawfully cast on ballots that the election authority prepared, distributed, and induced voters to rely on was justified by a compelling state interest?

2. Whether, in the alternative, an election authority deprived voters of the right to vote as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983 where the election authority's after-the-fact decision not to count votes lawfully cast on ballots that the election authority prepared, distributed, and induced voters to rely on was the least restrictive means of furthering a compelling state interest?

3. Whether, in the alternative, an election authority deprived voters of the right to vote as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42

U.S.C. § 1983 where the election authority induced voters to rely on the election authority's official pronouncements to follow the established election procedures of early, absentee, grace-period, and Election-Day voting on ballots that the election authority prepared and distributed, only to retroactively invalidate a potentially controlling number of votes lawfully cast by voters without giving those voters notice or an opportunity to recast their votes?

LIST OF PARTIES AND RULE 14(b) STATEMENT

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Arthur Parra, Sr., Kim Eng, Val Eng, Laura Eng, Kam Wan Chan, Eva Chan, Peter Chan, and Antonio Valenzuela, individually and on behalf of all voters similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, as revised on denial of rehearing and suggestion for rehearing en banc, July 19, 2010, is reported at 614 F.3d 635 (7th Cir. 2010). The revised opinion is reproduced at A-1a-5a. The court of appeals order denying the petition for rehearing and suggestion for rehearing en banc is not reported. The court of appeals order denying rehearing is reproduced at C-17a-18a.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, February 5, 2009, is not reported. The district court's opinion is reproduced at B-6a-16a.

JURISDICTION

This Court has jurisdiction to review the decision of the U.S. Court of Appeals for the Seventh Circuit, as revised on denial of rehearing and suggestion for rehearing en banc, entered July 19, 2010, under 28 U.S.C. §§ 1254(1) and 2101(c), and Supreme Court Rules 13.1 and 13.3, because this petition is filed

within 90 days of the date the Seventh Circuit denied rehearing, as computed by Supreme Court Rule 30.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV § 1; The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV § 1; and, 42 U.S.C. § 1983. These provisions are reproduced at D-19a-20a.

STATEMENT

This case is about the fundamental right to vote. In the advent of no-excuse, pre-Election Day in-person voting[1], the underlying opinion lends support to the Respondents stated policy that voters take a gamble and risk disenfranchisement when they choose to vote prior to Election Day (as is specifically provided by law) on a ballot provided to the voters by election

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[1] All states offer voters the option of voting prior to the Election Day. See, fn. 4 and fn. 5, *supra*, listing the specific statute of each state providing for pre-Election Day voting. In some states, the ballots are returned by mail. This is generally referred to as absentee voting. Other states permit voters to vote in person at the offices of county clerks, or at other satellite voting locations before Election Day. Satellite voting locations vary by state, and may include other county and state offices (besides the election authority's office), grocery stores, shopping malls, schools, libraries, and other locations. This is referred to as early voting or in-person absentee voting.

officials[2]. The Constitution, Petitioners submit, however, guarantees that a lawful voters' ballot is never cast in vain. Consequently, Petitioners challenge in this matter the Respondents' after-the-fact decision not to count a potentially controlling number of votes that were lawfully cast on ballots that Respondents prepared, distributed, and induced voters to rely on as running afoul of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The district court granted the Respondents cross-motion for summary judgment. The court of appeals affirmed that decision.

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[2] According to a spokesman for Respondents, "There's no guarantees in early voting; there's no guarantees in life." Jessica Del Curto, 25th Ward Case Continues, Medrano Backers Upset With Board, EXTRA, March 29, 2007, available at http://www.extranews.net/news/2631/25th-ward-case-continues-medrano-backers-upset-with-board (last visited on October 17, 2010)

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Revised Opinion Creates A Split Among The Circuits Over Whether The Intentional Decision By Election Officials To Send Out Absentee Ballots To Voters And Then Refuse To Tally Those Ballots of a Potentially Controlling Number of Votes, as Was Done in This Case, Is Clearly An "Officially Sponsored Election Procedure" And Not Just An "Unintended Election Irregularity."

The issue in the case below is identical to the issue decided in *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978), and in *Hoblock v. Albany County Bd. of Elections*, 341 F. Supp. 2d 169, *aff'd* 422 F.3d 77 (2d Cir. 2005), *remanded to* 487 F. Supp. 2d 90 (N.D.N.Y. 2006), two cases in which the election officials' interpretation of state election law and then intentional decision to issue invalid ballots to voters led directly to court orders from the highest courts of two states, Rhode Island and New York, respectively, instructing the election officials in those states not to count those ballots.

Notably, *Griffin* and *Hoblock* hold that the intentional decision by election officials to send out absentee ballots to voters and then refuse to tally those ballots, as the intentional decision in this case was to issue ballots to voters indicating that a certain candidate was an official candidate to be voted on and after-the-fact refusal to tally any ballot cast for that particular candidate is clearly an "officially sponsored election procedure" and not just an "unintended

election irregularity." *See, Hoblock*, 341 F. Supp. 2d at 177. It is of no consequence that the Respondents in this case were merely following orders[3] from the Illinois Supreme Court because, "When a group of voters are handed ballots by election officials that, unsuspected by all, are invalid, **state law may forbid counting the ballots, but the election itself becomes a flawed process**." *Griffin*, 570 F.2d at 1077. (Emphasis added).

Further, it does not matter that there wasn't any ulterior or nefarious motive in issuing the ballots to the voters in this case or that no facts were presented to suggest that the voters in this case were singled-out and intentionally "trapped" into voting for a candidate that became ineligible to hold office three days prior to Election Day so that those votes could be discarded because it is the Respondents' legal and expert interpretation of Section 3.1-10-5(b) of the Illinois Municipal Code and the Respondents' subsequent intentional issuance of the ballots that led directly to the supervisory order from the Illinois Supreme Court instructing the Respondents not to count the ballots cast for the candidate that became ineligible. *Hoblock*,

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[3] The court of appeals revised opinion does not acknowledge that the Due Process Clause of the Fourteenth Amendment to the United States Constitution was found to have been violated in cases involving court orders from the highest state court instructing election officials not to count absentee ballots in the First Circuit case, *Griffin*, 570 F.2d at 1067-1068, (involving an order of the Rhode Island Supreme Court not to count absentee votes cast), and in the Second Circuit case, *Hoblock*, 422 F.3d at 82-83, (involving an order of the New York Court of Appeals which is the highest court in the state of New York, *see*, NY. Const. art. VI, § 3 not to count absentee votes cast).

487 F. Supp. 2d at 95. Notably, it was not the voters' decision of what candidate to place on the ballot given to them. Consequently, this Court should hear this case to settle the split amongst the court of appeals on this issue, i.e., to decide whether the fundamental right to vote becomes conditional based on when and how the franchise is exercised, i.e., whether the right to vote is conditional if one votes prior to Election Day (as is permitted by law) on a ballot intentionally issued by an election authority that is later deemed to be defective, or the right to vote is a fundamental right but only if exercised on Election Day.

II. No Less Than Nine State Supreme Courts Have Adopted The General Rule Of American Elections That Votes Cast For A Deceased, Disqualified Or Ineligible Person Are To Be Counted In Determining The Results Of The Election As Regards The Other Candidates.

The Supreme Court of Oklahoma has adopted the general rule of American elections that "votes cast for a deceased, disqualified or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards the other candidates." *Evans v. State Election Bd. of Oklahoma*, 804 P.2d 1125, 1130 (Okla. 1990). This reasoning has been accepted by eight other state supreme courts. See, *Banks v. Zippert*, 470 So. 2d 1147 (Ala. 1985); *Alongi v. Schatman*, 57 N.J. 564, 579 (N.J. 1970); *West Virginia ex rel. Jackson v. County Ct. of McDowell County*, 166 S.E.2d 554 (W. Va. 1969); *Tellez v. Superior Ct. of Arizona*, 450 P.2d 106 (Ariz. 1969); *Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959);

Shroyer v. Thomas, 81 A.2d 435 (Pa. 1951); 30 *Missouri ex rel. Herget v. Walsh*, 7 Mo. App. 142 (Mo. 1879); and, *Saunders v. Haynes*, 13 Cal. 145 (Cal. 1859). The acceptance of the American rule of elections comports with the notion that voting is a fundamental right and the fact that candidates oftentimes die, become disqualified, or are ultimately adjudged ineligible well after the ballots are printed, intentionally distributed to voters, and after votes are cast on those ballots.

The decision below, however, is contrary to the general rule of American elections, well established for over a hundred years, which is partially codified in Illinois law. See 10 ILCS 5/7-57 (2007) ("The death of any candidate prior to, or on, the date of the primary shall not affect the canvass of the ballots. If the result of such canvass discloses that such candidate, if he had lived, would have been nominated, such candidate shall be declared nominated.") The rule is grounded in the following logic:

> An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does

> not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject.

Evans v. State Election Bd. of Oklahoma, 1990 OK 132, 804 P.2d 1125, 1130 (Okla. 1990), quoting *Saunders v. Haynes*, 13 Cal. 145 (Cal. 1859). Also, the decision below critically undermines the fundamental right to vote if the right is to be exercised prior to Election Day (as is specifically provided by law) on a ballot intentionally provided to voters by election officials. Moreover, the decision below conflicts with the mandate of 65 ILCS 20/21-26, which requires that a candidate receive the majority of all votes cast to be elected. But if you do not count all lawful votes cast prior to Election Day, which were cast on the official ballots intentionally provided to voters prior to Election Day, then you more than likely get a different result than that required by law. For all of these reasons, this case represents the ideal vehicle to decide this split of opinion whether the intentional decision by election officials to send out early and absentee ballots to voters and then refusing to tally those ballots of a potentially controlling number of voters, as was done in the underlying case, and after-the-fact refusal to tally any ballot cast is clearly an "officially

sponsored election procedure" and not just an "unintended election irregularity."

III. Early Voting Is The Norm And In The Advent Of No-Excuse, Pre-Election Day In-Person Voting, More And More Voters Risk Disenfranchisement By Exercising The Franchise (As is Allowed By Law in All States) Prior To Election Day.

Congress has mandated a uniform date throughout the United States for presidential elections, 3 U.S.C. § 1, and for the date that congressional elections are to take place. 2 U.S.C. § 1. Similarly, Illinois law mandates the time and place for the holding of elections for state and local offices. See e.g., 10 ILCS 5/2A-1.1(b); 10 ILCS 5/2A-1.2(d); 10 ILCS 5/2A-26; 65 ILCS 20/21-5; 65 ILCS 20/21-5a; 65 ILCS 20/21-12; 65 ILCS 20/21-22; 65 ILCS 20/21-25 and 65 ILCS 20/21-26.

But notwithstanding the mandate to hold Election Day on a certain date for federal office and state offices, respectively, Congress, the Illinois legislature, and the laws of all 50 states provide for early voting and absentee voting prior to Election Day.[4] This is

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[4] All states offer voters the option of voting prior to Election Day. See, (Alabama), Ala Code § 17-11-3; (Alaska), AS 15.20.010; AS 15.20.061; AS 15.20.064; (Arizona), ARS §§ 16-409, 16-541, 16-544, 16-548; (Arkansas), Arkansas Code §7-5-402, §7-5-418; (California), California Election Code §§ 3001, 3003, 3018, 3020, 3200-3206, 4000; (Colorado), Colorado Revised Statutes §§ 1-8-202, 1-8-104.5, 1-5-101, 1-7.5-104; (Connecticut), General Statutes of Connecticut § 9-140); (Delaware), Delaware Code Title 15, § 5503; (Florida), Florida Statutes Title IX §§ 101.6102, 101.657;

Florida Administrative Code § 1S-2.022; (Georgia), Official Code of Georgia Annotated §§ 21-2-380, 21-2-382, 21-2-383; (Hawaii), Hawaii Revised Statutes §§ 11-91.5, §15-4, 15-7; Hawaii Administrative Rules §§ 2-53-3, 2-53-6; (Idaho), Idaho Statutes §§ 34-308, 34-1001, 34-1002, 34-1006; (Illinois), 10 Illinois Compiled Statutes §§ 5/19-1, 5/19-2, 5/19-2.1,19A-15; (Indiana), Indiana Code §§ 3-11-10-24, 3-11-10-26, 3-11-10-26.3; (Iowa), Iowa Code §§ 53.2, 53.10; (Kansas), Kansas Statutes §§ 25-1119, 25-1122, 25-1122a, 25-1123, 25-432; (Kentucky), Kentucky Revised Statutes § 117.085; 31 Kentucky Administrative Regulations 4:040; (Louisiana), Louisiana Revised Statutes §§18-1303, 18-1307, 18-1309, 18-1309.2; (Maine), Maine Constitution, Article II, Section 4; Maine Revised Statutes Title 21-A §§ 751, 753-B, 754; Maine Resolves of 2005, c. 70; (Maryland), Maryland Election Law §§ 9-304, 9-305; (Massachusetts), Massachusetts General Laws, Chapter 54 §§ 86, 92; (Michigan), Michigan Election Law § 168.758, 168.759; (Minnesota), 2008 Minnesota Statutes §§ 203B.02, 203B.08, 203B.081; (Mississippi), Mississippi Code Title 15 §§ 23-15-631, 23-15-713, 23-15-715; (Missouri), Revised Statutes of Missouri §§ 115.277, 115.279, 115.652; 15 CSR 30-5.020; (Montana), Montana Code Annotated §§ 13-13-201, 13-13-211, 13-13-212, 13-13-222, 13-19-101—13-19-106, 13-19-205; (Nebraska), Nebraska Revised Statutes §§ 32-938, 32-941, 32-942, 32-952, 32-960; Nebraska Administrative Code Title 432 Chapter 1; (Nevada), Nevada Revised Statutes §§ 293.213, 293.313, 293.315, 293.356, 293.3561, 293.3564, 293.3568, 293.3572, 293.3576; (New Hampshire), New Hampshire Revised Statutes Annotated § 657:4, 657:22; (New Jersey), New Jersey Statutes Annotated § 19:57-3, 19:57-4, 19:62-1; (New Mexico), New Mexico Statutes Annotated §§ 1-6-3, 1-6-5, 1-6-5.6, 1-6-5.7, 1-23-3; (New York), New York Election Law § 8-400; (North Carolina), North Carolina General Statues §§ 163-226, 163-227.2, 163-230.1; (North Dakota), North Dakota Century Code §§ 16.1-07-01, 16.1-07-15, 16.1-11.1-01; (Ohio), Ohio Revised Code §§ 3509.02, 3509.03; (Oklahoma), Oklahoma Statutes §§ 26-14-103, 26-14-105, 26-14-108; Oklahoma Administrative Rules§§ 230:30-3-3, 230:30-7-6.2; (Oregon), Oregon Revised Statutes §§ 253.030, 253.135, 254.465, 254.470, 254.474; (Pennsylvania), 25 P.S. §§ 3146.1, 3146.2, 3146.2a); (Rhode Island), Rhode Island General Laws §§ 17-20-1, 17-20-2, 17-20-2.1, 17-20-2.2; (South Carolina), SC Code of Laws

important because, according to the United States Elections Project at George Mason University, approximately 30% of all votes cast in the presidential election of 2008 were cast prior to Election Day. (See, Michael P. McDonald, Ph.D., (Nearly) Final 2008 Early Voting Statistics, last updated on May 1, 2010, available at http://elections.gmu.edu/Early_Voting_2008_Final.html (last visited on October 17, 2010.) This is a significant increase from 20% in 2004, and part of the upward trend experienced since 1992 when 7% of all votes cast were cast prior to Election Day. Id. These numbers are likely to increase greatly due to Congress's requirement that states send absentee ballots for the upcoming federal elections to U.S. military and overseas citizens, see e.g., Military and Overseas Voter Empowerment Act, ("MOVE"), recently enacted under Div. A., Title V, Subtitle H, §§ 575- 589 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84, 123 Stat. 2320-2328), the Uniformed and Overseas Citizens Absentee Voting Act, ("UOCAVA"), 42 U.S.C. § 1973ff-ff-6, as U.S. military personnel, their dependents, and overseas

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§§ 7-15-320, 7-15-330; (South Dakota), South Dakota Codified Laws §§ 12-19-1, 12-19-2, 12-19-2.1; (Tennessee), Tennessee Code Annotated §§ 2-6-102, 2-6-103, 2-6-201, 2-6-202; (Texas), Texas Statutes, Election Code §§ 81.001—81.004, 82.005,85.001—85.0072; (Utah), Utah Code §§ 20A-3-301, 20A-3-601, 20A-3-302, 20A-3-302.5; (Vermont), (Vermont Statutes Annotated, Title 17 § 2531, 2532a, 2537; (Virginia), Code of Virginia §§ 24.2-700, 24.2-701, 24.2-712; (Washington), Revised Code of Washington §§ 29A.40.010, 29A.40.040, 29A.48.010, 29A.48.040, Chapter 29A.46; Washington Administrative Code Chapter 434-250; (West Virginia), West Virginia Code §§ 3-3-1, 3-3-3, 3-3A-1—3-3A-5;(Wisconsin), Wisconsin Statues §§ 6.85, 6.86; (Wyoming), Wyoming Statutes §§ 22-9-102, 22-9-105; Secretary of State Rule 7041.

citizens take advantage of laws enacted in every state allowing them to vote in state and local elections prior to Election Day[5], and, as more voters, in general,

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[5] All states permit members of the military who are stationed overseas, their dependents, and other U.S. citizens living abroad to vote by absentee ballot in state elections. See, (Alabama), Ala. Code §§ 17-3-50, 17-11-7, 17-11-12; (Alaska), Alaska Statutes §§ 15.05.011, 15.07.070, 15.20.066, 15.20.081, 15.20.082:; (Arizona), Arizona Revised Statutes §§16-543, 16-543.01, 16-543.02; (Arkansas), Arkansas Code §§ 7-5-403, 7-5-406, 7-5-411; (California), California Election Code §§ 2102, 3001, 3103, 3103.5, 3104, 3300-3311; (Colorado), Colorado Revised Statutes §§ 1-2-208, 1-2-209, 1-2-209.5, 1-8-103.3, 1-8-103.5, 1-8-116; 8 CCR 1505-1, Rule 25; (Connecticut), General Statutes of Connecticut §§ 9-25, 9-140, 9-153a, 9-153d, 9-153e, 9-158b-e; (Delaware), Delaware Code Title 15, §§ 1902, 5518, 5520, 5525; (Florida), Florida Statutes Title IX §§ 100.025, 101.62, 101.6951,101.697; Florida Administrative Code § 1S-2.013, 1S-2.030; (Georgia), Official Code of Georgia Annotated §§ 21-2-219, 21-2-224, 21-2-381.1, 21-2-381.2, 21-2-384; (Hawaii), Hawaii Revised Statutes §§ 15-5, 15-9; Hawaii Administrative Rules §§ 2-53-17, 2-53-18, 2-53-20; (Idaho), Idaho Statutes §§ 34-1002, 34-1003, 34-1005; (Illinois), Illinois Compiled Statutes §§ 5/4 23, 5/20-2, 5/20-2.1, 5/20-2.2, 5/20-2.3, 5/20-8; (Indiana), Indiana Code §§ 3-7-36-2, 3-7-36-14, 3-11-4-6, 3-11-4-12, 3-11-4-13; (Iowa), Iowa Code §§ 53.17, 53.39, 53.40, 53.45; Iowa Administrative Code §§ 721—21.320(3), 721—21.320(4); 721—21.320(53); (Kansas), Kansas Statutes §§ 25-1216, 25-1220, 25-1221; (Kentucky), Kentucky Revised Statutes §§ 116.0452, 116.045, 117.085, 117.086; 31 Kentucky Administrative Regulations 4:130; (Louisiana), Louisiana Revised Statutes §§18-135, 18-1306, 18-1307, 18-1308; (Maine), Maine Revised Statutes Title 21-A §§ 753-A, 755,780; (Maryland), Maryland Election Law §§ 3-302, 9-305; Code of Maryland Regulations §§ 33.11.02.02, 33.11.03.08; (Massachusetts), Massachusetts General Laws, Chapter 54 §§ 95, 99; (Michigan), Michigan Election Law §§ 168.714, 168.759a, 168.765; (Minnesota), 2008 Minnesota Statutes §§ 203B.04, 203B.08, 203B.17, 204B.35, 203B.225; (Mississippi), Mississippi Code Title 15 §§ 23-15-47, 23-15-637, 23-15-657, 23-15-685, 23-15-687, 23-15-693, 23-15-699; 21 000 CMSR

022; (Missouri), Revised Statutes of Missouri §§ 115.135, 115.279, 115.281, 115.291, 115.292, 115.293; (Montana), Montana Code Annotated §§ 13-2-301, 13-13-205, 13-21-104,13-21-201, 13-21-202, 13-21-207, 13-21-210; Administrative Rules of Montana 44.3.1403, 44.3.2511; (Nebraska), Nebraska Revised Statutes §§ 32-808, 32-939, 32-941; (Nevada), Nevada Revised Statutes §§ 293.309, 293.3155, 293.3157, 293.323; Nevada Administrative Code § 293.301; (New Hampshire), New Hampshire Revised Statutes Annotated §§ 654:20, 657:3, 657:6, 657:10, 657:10-a, 657:12, 657:13, 657:22; (New Jersey), (New Jersey Statutes Annotated §§ 19:31-6, 19:57-3, 19:57-4,19:57-7, 19:57-11, 19:59-4, 19:59-8.1, 19:59-10; (New Mexico), (New Mexico Statutes Annotated §§ 1-6-4, 1-6-4.1, 1-6-4.2, 1-6-5, 1-6-9, 1-6-10; New Mexico Administrative Code § 1.10.12.9; (New York), New York Election Law §§ 7-123, 7-124, 8-412, 9-209, 10-106,10-108, 10-114, 11-200, 11-202, 11-210, 11-212; (North Carolina), North Carolina General Statutes §§ 163-227.3, 163-231,163-234, 163-245, 163-247, 163-250, 163-254, 163-257; North Carolina Administrative Code §§12.0102—12.0111; (North Dakota), North Dakota Century Code §§ 16.1-07-01, 16.1-07-05, 16.1-07-08.1, 16.1-07-09; (Ohio), Ohio Revised Code §§ 3509.022, 3509.031, 3509.05, 3511.02, 3511.04; (Oklahoma), Oklahoma Statutes §§ 26 14 103, 26-14-104, 26-14-116, 26-14-117, 26-14-118, 26-14-118.1, 26-14-120.1; Oklahoma Administrative Rules §§ 230:30-5-8.1,230:30-9-5.1, 230:30-11-6.1; (Oregon), Oregon Revised Statutes §§ 247.025, 253.030, 253.045, 253.065, 253.070, 253.540, 253.545, 253.565; (Pennsylvania), 25 Pa.C.S.A. §§ 1324, 1326; 25 P.S. §§ 3146.1, 3146.2,3146.2a 3146.3, 3146.5, 3146.8; (Rhode Island), Rhode Island General Laws §§ 17-20-2.1, 17-20-4, 17-20-6, 17-20-6.1, 17-20-9.2, 17-20-10.2, 17-20-16; (South Carolina), SC Code of Laws §§ 7-5-150, 7-15-110, 7-15-220, 7-15-230, 7-15-330, 7-15-400, 7-15-405, 7-15-460; (South Dakota), South Dakota Codified Laws §§ 12-4-4.6, 12-4-4.7, 12-19-2.3,12-19-12; (Tennessee), Tennessee Code Annotated §§ 2-2-109, 2-6-202, 2-6-310 2-6-502, 2-6-503; (Texas), Texas Statutes, Election Code §§ 86.004, 86.007, 101.003,101.004, 101.0071, 105.002; Texas Administrative Code, Rule § 81.39; (Utah), Utah Code §§ 20A-3-304, 20A-3-306, 20A-3-404, 20A-3-406, 20A-3-408.5; (Vermont), Vermont Statutes Annotated, Title 17 § 2144, 2531, 2539, 2543, 2549; (Virginia), Code of Virginia §§ 24.2-416, 24.2-419, 24.2-440, 24.2-441, 24.2-443.1, 24-2.612, 24.2-614, 24.2-701, 24.2-702, 24.2-

become comfortable with early voting and absentee voting that takes place prior to Election Day, which, again, is now offered in every state[6]. This Court should hear this case because more and more voters (over time) are choosing to exercise their fundamental right to vote prior to Election Day, and because most voters are not aware that casting a ballot prior to Election Day may subject them to being disenfranchised.

IV. Early and Absentee Voters Should Not Be Taking a Gamble on Whether They Will Be Disenfranchised, Especially Not a Potentially Controlling Group of Voters As In This Case, Merely Because They Choose To Cast the Ballot Issued To Them Prior To Election Day

There are 110 separate, distinct, independent election authorities within the State of Illinois, as listed by the Illinois State Board of Elections on its website, which information is available at http://www.elections.il.gov/ElectionAuthorities/ElecAuthorityList.aspx, (last visited on October 18, 2010). Each of these election authorities administer elections

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703, 24.2-707, 24.2-709; (Washington), Revised Code of Washington §§ 29A.40.020, 29A.40.050, 29A.40.070, 29A.40.150; Washington Administrative Code §§ 434-235-020, 434-235-030, 434-235-040; (West Virginia), West Virginia Code §§ 3-2-6, 3-3-5, 3-3-5b, 3-3-11; (Wisconsin), Wisconsin Statutes §§ 6.22, 6.221, 6.24, 6.25, 6.28; (Wyoming), Wyoming Statutes §§ 22-3-102, 22-3-117, 22-9-119, 22-6-107; Secretary of State Rule 5639.

[6] All states offer voters the option of voting prior to Election Day. See, fn. 4 and fn. 5, *infra*.

that are held in Illinois. This includes issuing ballots to early and absentee voters. Granted, typographical mistakes are often made on ballots. See e.g., *Ballots will be fixed to read 'Whitney' instead of 'Whitey'*, The Chicago Tribune, October 15, 2010, available at http://www.chicagobreakingnews.com/2010/10/ballots-will-be-fixed-to-read-whitney-instead-of-whitey.html (last viewed October 18, 2010).

Granted, again, sometimes there are legal challenges to whether a particular party, a particular candidate, or a particular issue should be placed on the ballot, and sometimes, in these occasions, some election authorities have waited until the issue resolves itself before issuing the challenged ballots to early and absentee voters. Two examples readily come to mind. This happened on March 29, 2009, when Champaign County (Illinois) Clerk Mark Shelden, as the chief election authority for the entire county, decided to postpone early voting in Urbana, Illinois, until new and correct ballots could be created for the April 7, 2009 Consolidated General Election. See, *Clerk Puts Early Voting on Hold for New Ballots*, The Champaign-Urbana News-Gazette, March 29, 2009, at A-4. The second example occurred in Downstate St. Clair County (Illinois) when St. Clair County (Illinois) Clerk Bob Delaney, as the chief election authority for the entire county, decided to postpone issuing ballots for overseas military and in-country military voters until October 4, 2010, to wait and see if the Libertarian Party was ruled on or off the ballot. See, Abdon M. Pallasch, *No sign of Democratic officials keeping ballots from soldiers*, Chicago Sun-Times, October 15, 2010, available at http://suntimes.com/news/politics/2805612,elections-ballots-soldiers-101510.article (last viewed October 18, 2010).

Agreed, delaying the issuance of defective ballots to early and absentee voters is preferable to intentionally issuing ballots that the election authority has reason to believe are defective, or may become defective due to a legal challenge. Perhaps this hodgepodge of who decides how and when to issue ballots to early voting and absentee voters will continue. But the question will remain, and the underlying opinion creates a split of authority concerning whether the intentional decision by election officials to send out early and absentee ballots to voters and then refusing to tally those ballots of a potentially controlling number of votes, as was done in the underlying case, and after-the-fact refusal to tally any ballot cast is clearly an "officially sponsored election procedure" and not just an "unintended election irregularity." This Court should decide this issue and not leave to chance whether the early and absentee voter will receive a correct ballot based on locality, circumstance, or the good graces of the election authority that is ultimately charged with deciding the correctness of the ballot and the timing of issuing early and absentee ballots to each particular voter. Not deciding this issue will continue this sad state of affairs, namely, the complete "exclusion of otherwise qualified persons from the franchise" based on the timing of a voter's choosing to cast a ballot. *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970).

CONCLUSION

Because this is an important and timely question of voting rights law – and there is a circuit conflict- the issue warrants this Court's attention. Further, because this is an issue affecting all early and absentee voters throughout this county, and because this issue will continue to repeat itself, this Court should grant a writ of certiorari to review the final judgment and revised opinion of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-1404

[Revised July, 19 2010]

ARTHUR PARRA, SR., et al.,
Plaintiffs-Appellants,

v.

LANGDON NEAL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 1506—**John W. Darrah**, *Judge.*

ARGUED JUNE 5, 2009—DECIDED JUNE 23, 2010

Before MANION, ROVNER, and TINDER, *Circuit Judges.*

ROVNER, *Circuit Judge.* The plaintiffs, all registered voters in the Chicago Municipal Consolidated Primary Election on February 27, 2007, sued the Board of Election Commissioners for the City of Chicago and its members under 42 U.S.C. § 1983,

claiming that the defendants invalidated their votes in violation of their rights under the Fourteenth Amendment. The district court granted summary judgment for the defendants. We affirm the judgment.

At summary judgment, the plaintiffs filed an opposition to the defendants' motion but did not bother to respond to their statement of material facts. *See* N.D. ILL. L. R. 56.1(a)(3), (b)(3). The district court thus accepted the defendants' statement of material facts as true. *See id.* R. 56.1(b)(3)(c); *Cracco v. Vitran Exp., Inc.*, 559 F.3d 625, 632 (7th Cir. 2009); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003). We do as well.

In December 2006, Ambrosio Medrano, Daniel Solis, and five others filed nomination papers with the Election Board to be placed on the ballot for the February 27, 2007, primary election as candidates for alderman of the 25th Ward in Chicago. One month later, three voters filed objections to Medrano's nomination papers on the ground that Illinois law barred him from holding office due to a prior felony conviction. *See* 65 ILCS 5/3.1-10-5(b). The Election Board disagreed with the objections, however, and placed Medrano on the ballot as a candidate for alderman. The Circuit Court of Cook County affirmed the Board's decision, but on February 23, four days before the election, the Supreme Court of Illinois overturned the judgment of the circuit court and ordered the Board to reject Medrano's nomination papers and remove his name from the ballot. The state supreme court further directed that, "if removal of Mr. Medrano's name from the ballot cannot be accomplished prior to election day, the Election Board shall be required to disregard any votes cast for him in

determining the winner of the election." *Delgado v. Bd. of Election Comm'rs*, 865 N.E.2d 183, 189 (Ill. 2007).

The Election Board determined that it was incapable of reprinting paper ballots and reprogramming touchscreen voting machines to remove Medrano's name from the ballot for the thirty-one precincts in the 25th Ward. The Board decided instead to post signs explaining in three languages that votes for Medrano would not be counted. Those signs were placed at all early voting sites immediately after the state supreme court's decision and at all voting sites on the day of the primary election. On election day, officials also handed individual notices to every voter in the 25th Ward, explaining that votes for Medrano would not be counted. Despite these efforts eighty-eight votes were cast for Medrano on election day. He also had received ninety votes during the early and absentee voting period. The Election Board disregarded all 178 votes for Medrano and declared that Solis had won the election for alderman with over 3,500 votes.

One month after the election, the eight plaintiffs, who had voted for Medrano, sued the Board and its members alleging "intentional retroactive invalidation" of their votes. Six of the eight plaintiffs voted in person on election day, yet none of those six even alleged that they cast their votes without knowing that Medrano had been disqualified. The district court granted summary judgment for the defendants on the ground that the undisputed facts come nowhere close to what would be necessary to establish a § 1983 claim for voting irregularities.

On appeal the plaintiffs renew their principal argument that the defendants violated their right to equal protection by refusing to count their votes. We review the grant of summary judgment de novo to determine whether the record establishes that the defendants were entitled to judgment as a matter of law. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009). When a plaintiff invokes § 1983 in federal court to challenge the conduct of a state or local election, the district court must balance the protection of the right to vote enshrined in the First and Fourteenth Amendments with the avoidance of excessive entanglement of federal courts in state and local matters. *Dieckhoff v. Severson,* 915 F.2d 1145, 1148 (7th Cir. 1990); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1271-72 (7th Cir. 1986). Accordingly, we have held that election irregularities implicate § 1983 only when defendants have engaged in "*willful* conduct which undermines the organic processes by which candidates are elected." *Kozuszek v. Brewer*, 546 F.3d 485, 488 (7th Cir. 2008) (quoting *Bodine,* 788 F.2d at 1272); *see also Dieckhoff,* 915 F.2d at 1148; *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 343 (7th Cir. 1987). "Willful conduct" means, at a minimum, that the defendants acted with the intent of subverting the electoral process or impairing a citizen's right to vote. *See Kozuszek*, 546 F.3d at 488; *Kasper*, 814 F.2d at 343.

In this case the plaintiffs do not even allege, let alone offer proof of, any wrongdoing on the part of the defendants. The Supreme Court of Illinois declared Medrano ineligible for office just four days before election day and recognized that removing his name from the ballot might not be feasible given the short time frame. After the Election Board determined that

it would not be possible to reprint the paper ballots and reprogram all touch-screen voting machines in four days, the decision was made to post at all voting sites in the 25th Ward signs informing voters that votes cast for Medrano would not be counted. Officials also handed out notices to every voter in the 25th Ward on election day. After all voting was completed, the Board complied with the state supreme court's order to disregard the votes cast for Medrano by invalidating those 178 votes.

The plaintiffs contend that invalidation of the Medrano votes[1] was the "result of a series of calculated decisions" by the Election Board. Those decisions, according to the plaintiffs, included the initial rejection of the objections to Medrano's nomination papers (presumably to keep his name on the ballot until it was too late to remove it) and the refusal to postpone election day in the 25th Ward. But the plaintiffs provide no support for this contention. Neither the Board's decision to disregard the ninety votes that were cast for Medrano before the state supreme court ruled, nor its decision to proceed with the scheduled election in the 25th Ward evidence an intent to interfere with the voting process.

Therefore, the district court's grant of summary judgment for the defendants is AFFIRMED.

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[1] The plaintiffs also argue that the Election Board improperly disregarded votes cast for a write-in candidate, Rollande Girard. But there is no evidence in the record that Girard actually received any write-in votes, and certainly none of the plaintiffs voted for him.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 07 C 1506
Judge John W. Darrah

[Filed February 5, 2009]

ARTHUR PARRA, SR.; KIM FNG; VAL ENG; LAURA ENG; KAM WAN CHAN; EVA CHAN; PETER CHAN; and ANTONIO VALENZUELA,	)
Plaintiffs,	)
v.	)
LANGDON NEAL, Chairman; RICHARD COWEN, Secretary; MARISEL A. HERNANDEZ, Commissioner; LANCE GOUGH, Executive Director; members and directors, respectively of the CHICAGO BOARD OF ELECTION COMMISSIONERS, all in their official capacities,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Plaintiffs, voters in the Chicago Municipal General Election of February 27, 2007, brought suit against Defendants, the Chicago Board of Election Commissioners and its members, pursuant to 42 U.S.C. § 1983, alleging violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Before the Court are the parties' cross-motions for summary judgment.

UNDISPUTED FACTS

The following facts are taken from the Local Rule 56.1(a)(3) statements of material facts submitted by the parties. Contrary to Local Rule 56.1(b)(3), Plaintiffs failed to file a response to Defendants' 56.1(a)(3) statement. Therefore, Defendants' factual allegations are deemed to be admitted. *See Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000) *(Malec)* (moving party's factual allegations are deemed admitted if non-moving party fails to respond).

Plaintiffs Arthur Parra, Sr., Kim Eng, Val Eng, Kam Wan Chan, Evan Chan, Peter Chan and Antonio Valenzuela are registered voters in the City of Chicago. (Defs.' 56.1(a)(3) ¶ 1.) Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, alleging that Defendants intentionally retroactively invalidated Plaintiffs' votes for Alderman of the 25th Ward of the City of Chicago in the February 27, 2007 Municipal General Election. (Defs.' 56.1(a)(3) ¶ 3.)

Defendants Langdon Neal, Richard Cowen and Marisel Hernandez are members of the Chicago Board of Election Commissioners ("the Board"), duly

appointed under state law and charged with carrying out the duties and responsibilities entrusted to the Board. (Defs.' 56.1(a)(3) ¶ 4.) The Board constitutes the duly constituted Electoral Board for the City of Chicago, organized pursuant to state law to hear and pass upon objections to the nomination papers for candidates to be elected at the Municipal General Election. (Defs.' 56.1(a)(3) ¶ 5.) Defendant Lance Gough is the Executive Director of the Board and is charged with carrying out the administrative duties and functions of the Board. (Defs.' 56.1(a)(3) ¶ 6.)

In December 2006, Ambrosio Medrano, Cuahutémoc Morfin, Daniel "Danny" Solis, Aaron Del Valle, Juan M. Soliz, Joe D. Acevedo and Martha Padilla filed nomination papers with the Board, requesting to be placed on the ballot for the Municipal General Election as candidates for office of Alderman of the 25th Ward. (Defs.' 56.1(a)(3) ¶ 7; Pls.' 56.1(a)(3) ¶ 3.) In January 2007, the Board heard and passed on objections filed by Nicolas J. Delgado, Maria Godinez and Diana G. Garcia (the "Delgado Objectors") against the nomination papers filed by Medrano. (Defs.' 56.1(a)(3) ¶ 8.) The Delgado Objectors alleged that the Illinois Municipal Code, 65 ILCS 5/3.1-10-5(b), barred Medrano from holding the office of Alderman due to Medrano's 1996 conviction of felony extortion arising out of his misconduct while in the office of Alderman. (Defs.' 56.1(a)(3) ¶ 9.) On January 12, 2007, the Board overruled the Delgado Objections and ordered that Medrano be placed on the ballot as a candidate for Alderman of the 25th Ward. (Defs.' 56.1(a)(3) ¶ 10.)

From January 18, 2007 through February 22, 2007, the Board accepted applications for absent voters' ballots for the Municipal General Election in person or

by mail. (Defs.' 56.1(a)(3) ¶ 12.) During this period, twenty-one people voted for Medrano by absentee ballot. (Pls.' 56.1 (a)(3) ¶ 10.) From January 31, 2007 and February 13, 2007, the Board offered grace-period voting at its office. (Pls.' 56.1(a)(3) ¶ 14.) During that time, two people voted for Medrano as grace-period voters. (Pls.' 56.1(a)(3) ¶ 15.) From February 5, 2007 through February 22, 2007, the Board offered early voting at fifty sites throughout Chicago. (Defs.' 56.1(a)(3) ¶ 15.) During this period, sixty-seven people voted early for Medrano. (Pls.' 56.1(a)(3) ¶ 15.)

The Delgado Objectors filed a petition for review with the Circuit Court of Cook County (Defs.' 56.1(a)(3) ¶ 11.) On January 26, 2007, the Circuit Court of Cook County affirmed the Board's decision to place Medrano on the ballot. (Defs.' 56.1(a)(3) ¶ 13.)

The Delgado Objectors appealed the Circuit Court's decision directly to the Illinois Supreme Court. (Defs.' 56.1(a)(3) ¶ 14.) On February 23, 2007, the Illinois Supreme Court vacated the judgment of the circuit court and remanded the case to the circuit court, with instructions to enter judgment vacating the Board's decision and directing it to: (1) declare that Medrano is ineligible to run for office of Alderman pursuant to Illinois Municipal Code, 65 ILCS 513.1-10-5(b); (2) reject his nomination papers; and (3) remove his name from the ballot for the upcoming election. (Defs.' 56.1(a)(3) ¶ 16.) The Illinois Supreme Court further provided that, "[i]f removal of Mr. Medrano's name from the ballot cannot be accomplished prior to election day, the Election Board shall be required to disregard any votes cast for him in determining the winner of the election." (Defs.' 56.1(a)(3) ¶ 17.) On the same day, February 23, 2007, the Circuit Court of

Cook County, pursuant to the Illinois Supreme Court's order, entered an order complying with the order of the Illinois Supreme Court. (Defs.' 56.1(a)(3) ¶ 18.)

Between the afternoon of February 23, 2007 and 6:00 a.m., February 27, 2007, the Board did not have the capability of removing Medrano's name from either the optical scanning or the touchscreen balloting systems. (Defs.' 56.1(a)(3) ¶¶ 19, 21, 22.) Defendant Gough directed that notices, printed in English, Spanish and Chinese, be posted immediately in the in-House absentee voting site to inform voters that votes cast for Medrano would not be officially counted, tabulated or reported by the Board. (Defs.' 56.1(a)(3) ¶ 23.) Gough directed that similar notices be prepared for the polling places in the 25th Ward with instructions to the judges of election to provide a copy of the notice to each voter. (Defs.' 56.1(a)(3) ¶ 24.) On February 26, 2007, the Board met in order to consider the Delgado Objections on remand and entered an order reflecting the mandate of the court. (Defs.' 56.1(a)(3) ¶ 25.) On February 27, 2007, eighty-eight people voted in person for Medrano. (Pls.' 56.1(a)(3) ¶ 32.)

On March 20, 2007, the Board issued its official tabulated statement of returns and proclamation of results, which reflected that candidate Solis won the election for Alderman in the 25th Ward by receiving

3,522 votes of the 6,854 votes cast and counted.[1] (Defs.' 56.1(a)(3) ¶ 31.) As directed by the Illinois Supreme Court, the Board did not count the votes cast for

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[1] Previously, on March 2, 2007, in response to a FOIA request, the Board had provided a copy of the preliminary and unofficial Ward 25 totals as they existed as of 9:22 a.m. on March 2, 2007. (Defs.' 56.1(a)(3) ¶ 27.) As of that time, the Board had not yet completed counting provisional ballots or the absentee ballots and had not commenced the official canvass of results. (Defs.' 56.1(a)(3) ¶¶ 28-30.) The following chart reflects the vote totals reported on March 2, 2007, in response to the FOIA request. (Pls.' 56.1(a)(3) ¶ 35.)

Candidate	Votes Received	Percentage of Votes Cast
Daniel "Danny" Solis	3,520	49.95%
Cuahutémoc Morfin	1,534	21.77%
Ambroiso Medrano	178	2.53%
Aaron Del Valle	326	4.63%
Juan M. Soliz	625	8.87%
Joe D. Acevedo	291	4.13%
Martha M. Padilla	549	7.79%
Write-In	24	0.34%
Total	7,047	100%

candidate Medrano, which totaled 178.[2] (Defs.' 56.1(a)(3) ¶ 32.) The Board's March 20, 2007, official tabulated statement and proclamation of the results reflected that write-in candidate Rollande Girard, who had registered as a write-in candidate for Alderman of the 25th Ward, received no (0) write-in votes. (Defs.' 56.1(a)(3) ¶ 33; Pls.' 56.1(a)(3) ¶ 18.)

LEGAL STANDARD

Summary judgment is appropriate when there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir. 1994). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) *(Celotex)*.

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[2] The following chart reflects the vote totals reported in the official results issued on March 20, 2007. (Pls.' 56.1(a)(3) ¶ 39.)

Candidate	Votes Received	Percentage of Votes Cast
Daniel "Danny" Solis	3,522	51.39%
Cuahutémoc Morfin	1,535	22.40%
Aaron Del Valle	329	4.80%
Juan M. Soliz	627	9.15%
Joe D. Acevedo	291	4.25%
Martha M. Padilla	550	8.02%
Total	6,854	100%

Thus, although the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to demonstrate, through specific evidence, that there remains a genuine issue of material fact and show that a rational jury could return a verdict in the non-moving party's favor. *Celotex*, 477 U.S. at 322-27; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986) *(Anderson)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) *(Matsushita)*; *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 923 (7th Cir. 1994). Disputed facts are material when they might affect the outcome of the suit. *First Ind. Bank v. Baker*, 957 F.2d 506, 507-08 (7th Cir. 1992). When reviewing a motion for summary judgment, a court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 247-48; *Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 731 (7th Cir. 1999). However, a metaphysical doubt will not suffice. *Matsushita*, 475 U.S. at 586. If the evidence is merely colorable or is not significantly probative or is no more than a scintilla, summary judgment may be granted. *Anderson*, 477 U.S. at 249-250.

ANALYSIS

Plaintiffs allege that Defendants violated the Equal Protection Clause of the Fourteenth Amendment when they "retroactively invalidated" votes cast for Medrano without affording Plaintiffs an opportunity to recast their votes. Plaintiffs allege that Defendants violated the Due Process Clause of the Fourteenth Amendment

when they "induced Plaintiffs to rely on their official pronouncements . . . only to retroactively invalidate the votes cast by the Plaintiffs" for Medrano. Plaintiffs ultimately seek an order invalidating the Board's certification of the election results and either a new election or run-off election between the declared winner, Solis, and Morfin, who received the second most votes. Plaintiffs argue that had the 178 votes cast for Medrano been counted, and had the 24 write-in votes that Plaintiffs claim were cast for Rollande Girard been counted, Solis would not have won over fifty percent of the vote.[3]

To establish a violation of § 1983, Plaintiffs must prove "willful conduct which undermines the organic process by which candidates are elected." *Bodine v. Elkhart County Election Board*, 788 F.2d 1270, 1272 (7th Cir. 1986) (quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)). Here, even Plaintiffs' allegations do not come close to meeting this standard. As detailed above, the order from the Illinois Supreme Court to remove Medrano from the ballot came on February 23, 2007, just four days before the day of the election. The Board was unable to remove Medrano's name from the ballot on such short notice.[4] The Board

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[3] Plaintiffs offer nothing but speculation and faulty reasoning in support of their claim that Rollande Girard received any write-in votes.

[4] In their opposition brief, Plaintiffs attempt to dispute this point, claiming that the affidavit supporting this statement, that of Defendant Gough, does not cite concrete facts establishing its truth. However, as Gough has been Executive Director of the Board for twenty years, he is competent to assess the feasibility of removing a candidate's name from the ballot on such short

took reasonable steps to inform voters that votes for Medrano would not be counted. However, at that time of the Illinois Supreme Court's order, various forms of early voting had been ongoing for over a month. Thus, it was not possible for the Board to reach all voters before some votes for Medrano were cast. Considering the undisputed record of the Board's action, the steps taken following the order of the Illinois Supreme Court do not amount to willful conduct that undermines the electoral process, which is required to constitute a violation of § 1983.

Furthermore, even if the Medrano votes were counted in the total, the numbers still do not lead to the relief sought by Plaintiffs, namely a court-ordered run-off between Solis and Morfin. According to the Board's official results, Solis received 3,522 of the 6,854 votes cast, or roughly 51.4 percent of the vote. If the 178 votes cast for Medrano were included in the total, Solis still would have received 50.08 percent of the vote. As mentioned above, Plaintiffs argue that twenty-four additional write-in votes should be counted in the total. However, they provide nothing more than speculation that these votes were cast for a valid write-in candidate. *See* 10 ILCS 5/18-19.1 (write-in votes should be counted only for persons who have timely filed notarized declarations of intent to be a write-in candidate). It is not disputed that Rollande Girard filed the required declaration, but Plaintiffs

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notice. In any case, this dispute has already been decided in Defendants' favor because Plaintiffs failed to respond to Defendants' Local Rule 56.1(a)(3) statement of material facts and, thus, this point is admitted for purposes of this motion. *See Malec*, 191 F.R.D. at 584.

have presented no evidence that Girard received any write-in votes.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment is granted. Plaintiffs' motion for summary judgment is denied.

Dated: 2-5-09

/s/JOHN W. DARRAH
JOHN W. DARRAH
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 09-1404

[Filed July 19, 2010]

Before

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

ARTHUR PARRA, SR., et al.,
Plaintiffs-Appellants,
v.
LANGDON NEAL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 1506
John W. Darrah, *Judge*.

ORDER

No judge of the court having called for a vote on the Petition for Rehearing With Suggestion for Rehearing En Banc, filed by Plaintiffs-Appellants on July 7, 2010, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing With Suggestion for Rehearing En Banc is **DENIED**.

The opinion of the court is revised as follows:

On pages 5-6, we delete the text from, "The plaintiffs cite to no authority for their assumption that the Board had the legal authority to postpone election day only in the 25th Ward, . . ." through "The plaintiffs provide no grounds for federal court interference with the state supreme court's decision or the Board's implementation of that decision.[2]"

APPENDIX D

U.S. Const. Amend. XIV § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.